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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 470

AMERICAN POWER & LIGHT COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Commission rendered December 28, 1943, the order of the same date (R. 8–12), and the order denying the petitioner's application for rehearing dated January 12, 1944, have not yet been officially reported but have been published as Holding Company Act Releases Nos. 4791, 4824 (containing corrections), and 4825 (denying rehearing).[1] The opinion of the Cir-

[1] We are filing for the information of the Court copies of the findings and opinion of the Commission as corrected. A supplemental order dated January 11, 1944, published as Holding Company Act Release No. 4828, was not challenged in the court below.

cuit Court of Appeals for the First Circuit is reported at 143 F. (2d) 250.

JURISDICTION

The decree of the Circuit Court of Appeals dismissing the petition for review was entered on June 19, 1944 (R. 26). The petition for a writ of certiorari was filed September 16, 1944. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C., sec. 79x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C., sec. 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C., sec. 79, hereinafter referred to as "the Act"). The portions of respondent's order sought to be reviewed by petitioner were entered under Sections 15 (f) and 20 (a) of the Act. The text of these provisions is set forth in the Appendix, *infra*. Section 24 (a) of the Act provides in pertinent part:

> Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of

> Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. * * *

QUESTIONS PRESENTED

Whether a controlling stockholder of a company ordered by the Commission to effect changes in its accounts is a person "aggrieved" by such order within the meaning of Section 24 (a) of the Holding Company Act and is entitled as such to file an independent petition for review of such order.

STATEMENT

The petitioner, American Power & Light Company, incorporated in the State of Maine, is a subsidiary holding company in the Electric Bond and Share holding-company system and is itself a registered holding company. It is now the sole stockholder of Florida Power & Light Company, which is an electric and gas utility company in-

corporated in and operating exclusively in Florida.[2]

The order under review was entered in administrative proceedings in which there were consolidated, for purpose of hearing, issues raised by the Commission as to the necessity for Florida to effect changes in its accounts and security structure under applicable provisions of the Act, with proposals of Florida and American to meet those issues by what petitioner has characterized as a financial reorganization. These proposals, authorized by the Commission, include the elimination of "write-ups" in the accounts of Florida, capital contributions by American to Florida through surrender of certain debt securities and preferred stocks of Florida held by American, and the issuance and sale to the public of new bonds, debentures, and notes of Florida to "refund" the then outstanding publicly held bonds and preferred stocks of Florida. There remained a dispute as to the necessity of Florida's making certain additional accounting adjustments. The particular paragraphs of the Commission's order under review, requiring such additional accounting adjustments, were (by paragraph 5 of the order) expressly made severable from the remaining paragraphs of the order, and compliance therewith

[2] Petitioner and the above-mentioned associate companies are hereinafter referred to, respectively, as American, Bond and Share, and Florida.

was expressly stated not to be a condition to the granting of the applications of American and Florida to take the other action contemplated. The purpose of this severance was to facilitate anticipated judicial review.

On February 5, 1944, after consummation of the "reorganization," American filed its petition in the Circuit Court of Appeals for the First Circuit seeking to set aside paragraphs 2 and 4 of the order of December 28, 1943 (R. 1). On February 24, 1944, the Commission filed its motion to dismiss the petition, pointing out that "the Commission does not challenge the right of petitioner's subsidiary Florida Power & Light Company to seek review of this order, which is specifically directed to it", and that "we have given notice of our motion to petitioner in ample time for it to cause its subsidiary to file its petition for review in an appropriate circuit" (R. 14).[3] On February 25, 1944, Florida filed in the United States Circuit Court of Appeals for the Fifth Circuit its petition to review the same paragraphs of the Commission's order which had been challenged by American.

On June 19, 1944, the court below dismissed American's petition for review and it is this order which petitioner seeks to have reviewed by this Court.

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[3] The venue provisions of Section 24 (a) limit Florida to filing a petition for review either in the United States Court of Appeals for the District of Columbia or in the Circuit Court of Appeals for the Fifth Circuit.

ARGUMENT

The narrow issue involved is whether Congress in providing for review of Commission orders by any person "aggrieved" intended to authorize such review by a controlling stockholder of the corporation to which an order is directed and which is both immediately affected, and admittedly "aggrieved," by the order.

The decision of the court below that American was not aggrieved is correct, and, while a case of first impression under the statute, is in accord with the well settled principle that ordinarily corporate litigation must be conducted by and in the name of the corporation rather than its stockholders. Under that rule a stockholder desiring to litigate on behalf of his corporation first must show that he has been unable to induce the management of the corporation to litigate in the corporate name. It is this aspect of the derivative suit rule which was applied in the court below. American as the sole stockholder of Florida, and Bond and Share as the controlling stockholder of American, were in a position to cause the filing of such a petition by Florida, and in fact Florida has filed its petition in the Fifth Circuit.

Florida's right to seek review of the order is not in dispute and review on Florida's petition will fully protect the rights of petitioner.[4] The

[4] As we note below, we believe there is no substance in American's fears that American may have grounds for challenging the order not available to Florida.

only question here is whether controlling stockholders have, as petitioner contends, an independent standing to seek review of an order in addition to that available to the subsidiary against which the order is directed. Petitioner conceded in its argument in the court below that Bond and Share as the controlling stockholder of petitioner would have had a standing to file a petition for review of the order in the Second Circuit equal to that of petitioner to file in the First Circuit.[5] Limiting those in control of Florida to the two circuits unquestionably available under section 24 (a) (see note 3, p. 5, *supra*) does not present a question of sufficient importance to warrant review by this Court.

The opinion of the court below discusses broader aspects of the derivative suit rule in its application to minority as well as controlling stockholders, and this was in fact the issue in two cases in the Second Circuit Court of Appeals mentioned in petitioner's brief. Whatever may be the problem as to the rights of minority stockholders (cf. pp. 12–14, *infra*), the present case, dealing with the rights of a sole stockholder and lim-

[5] Indeed, if the limitations of the derivative suit rule are inapplicable, any company objecting to an order directly affecting it could always find a friendly stockholder willing to lend his name to a petition for review who resided in any one of the ten circuits which might seem to those directing the company's litigation policy a desirable forum for the review proceeding.

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ited in importance to a question of venue, is not an appropriate means for bringing to this court the broader problems in issue in the Second Circuit cases.

1. Florida, not American, is the company directly affected by the order and American's interest therein is only derivative through its ownership of stock of Florida. The provisions complained of direct Florida to make certain accounting entries. Nothing in the order requires American to do anything or to refrain from doing anything. American itself is not even mentioned in the paragraphs of the order sought to be reviewed. The only objections to the order stated in the petition for review are general allegations of lack of power of the Commission to enter such an order; objections to the effect of the order upon Florida; and objections to the alleged impairment of American's position as a stockholder of Florida by virtue of the effect of the order on Florida's ability to pay dividends. The only relief which the petition for review seeks or could seek is that Florida be relieved from complying with the requirements of the order. Thus American, while purporting to seek judicial review on its own behalf, is necessarily acting on behalf of Florida.

2. The controlling principles of law applicable to the conduct of corporate litigation preclude a petition for review by American on

behalf of Florida. The corporation as an entity is the sole person entitled to sue and be sued with respect to corporate rights, and the management, not the stockholders, is alone vested with authority to transact corporate business, including the conduct of litigation. Stockholders may bring derivative suits to invoke the aid of the courts for wrongs done to the corporation only where the directors have refused to sue, or where a demand that they do so would be unavailing; and where the refusal to sue amounts to a breach of trust or duty: *Hawes* v. *Oakland,* 104 U. S. 450, 460–461 (1882); *City of Detroit* v. *Dean,* 106 U. S. 537, 541–542 (1883); *United Copper Securities Company* v. *Amalgamated Copper Co.,* 244 U. S. 261, 263–264 (1917); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 318–322 (1936) (also see concurring opinion of Justice Brandeis, concurred in by Justices Stone, Roberts, and Cardozo, at pp. 342–344). The stockholder can act only when the corporation refuses to act.

These principles are applicable here. Petitioner makes no showing that Florida has wrongfully refused to seek review and, of course, petitioner could not so allege in view of its complete control of Florida as its sole stockholder and the holder of all its voting power. As noted, Florida did subsequently file its separate petition for review.

3. The court below properly rejected petitioner's contention that Congress in providing for judicial review by "any person aggrieved" intended to render inapplicable the derivative suit rule. We know of no cases which support this proposition and petitioner has cited none. We freely concede that the term "person aggrieved" has been construed, in the context of particular statutes, as giving certain persons economically affected by administrative orders, but whose private rights are not invaded thereby, standing to seek judicial review of those orders for the purpose of vindicating public interests in conformity to the applicable statutory standard. Petitioner cites in that connection *Federal Communications Commission* v. *Sanders' Radio Station*, 309 U. S. 470 (1940); *Federal Communications Commission* v. *National Broadcasting Company*, 319 U. S. 239 (1943); and also *Associated Industries, Inc.* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2), dismissed as moot pursuant to remand by this court, 320 U. S. 707. These are all cases where the particular economic interest asserted could have no other private representation if the petitioner in question did not have standing to challenge the order. None of these cases involved rights of stockholders to seek review for violation of orders affecting their companies, and none of them contained any indication that the term "person aggrieved" should be construed

as breaking down well-settled limitations on the rights of stockholders to litigate on behalf of their corporations.[6]

To permit controlling stockholders, or stockholders who may be acting in collusion with the management, to file independent petitions for review of orders affecting their company would be to encourage maneuvering to pick jurisdictions for litigation.[7] The position contended for by

[6] Petitioner apparently does not press here the argument urged on the court below that its participation in the proceedings below was conclusive as to its standing to seek review of the Commission's order. American was a necessary party to the proceedings below because of other aspects of the case not involved in its petition for review. Under these circumstances American's being a party to the administrative proceedings cannot be construed as a determination by the Commission that it has any legal interest to challenge, as a person aggrieved, provisions in the orders directed only to Florida. In any event, no liberality on the part of an administrative agency in permitting the joinder of parties to a proceeding before it can enlarge the jurisdiction of the reviewing court. As was said in *Pittsburgh & West Virginia Railway Company* v. *United States*, 281 U. S. 479, 486:

"The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it."

[7] In our original brief in support of our motion to dismiss we stated (note 3, pp. 8–9):

"We do not undertake to interpret the reason for American rather than Florida electing to file the petition in this case. However, it may be significant that there are precedents adverse to petitioner's position in the circuit courts to which Florida is entitled to resort. *Alabama Power Co.* v. *Federal Power Commission*, 134 F. (2d) 602 (C. C. A. 5, 1943);

petitioner would thus lead to abuses comparable to the historic evils where stockholders' derivative suits were brought to create diversity of citizenship and thereby confer federal court jurisdiction over corporate controversies which should have been litigated in the state courts.*

4. We do not, of course, question the fact that petitioner as the sole stockholder of Florida has an economic interest as substantial as that of Florida. Nor do we question the fact that the term "person aggrieved" is broad enough to include the economic interest of a stockholder as a "person aggrieved" by an order affecting his company wherever the circumstances are such as to make it inequitable that the stockholder be bound by the action or inaction of the management. Problems of this kind arise in connection with petitions for review filed by minority stockholders and by other individual security holders. Accordingly, the Commission has not challenged,

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Alabama Power Co. v. *Federal Power Commission*, 136 F. (2d) 929 (C. C. A. 5, July 8, 1943); *Alabama Power Co.* v. *McNinch*, 94 F. (2d) 601 (App. D. C. 1937); *Alabama Power Co.* v. *Federal Power Commission*, 128 F. (2d) 280 (App. D. C. 1942), cert. denied, 317 U. S. 652 (1942)."

* This background of the requirement in former Equity Rule 27 and its predecessor, Equity Rule 94, of an affidavit that the action is not collusive to confer jurisdiction is discussed in *Hawes* v. *Oakland*, 104 U. S. 450, 452, decided January 16, 1882. Former Equity Rule 94 was promulgated January 23, 1882, 104 U. S. IX.

and the courts have assumed, the right of individual security holders, including stockholders, to seek judicial review of Commission orders in cases where the order in question affects the rights of different classes of security holders *inter sese*, or where there are charges of fraud against the management and the complaining stockholder. See *Lawless* v. *S. E. C.*, 105 F. (2d) 574 (C. C. A. 1, 1939); *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943); *New York Trust Co.* v. *S. E. C.*, 131 F. (2d) 274 (C. C. A. 2, 1942); *City National Bank & Trust Co.* v. *S. E. C.*, 134 F. (2d) 65 (C. C. A. 7, 1943); *Okin* v. *S. E. C.*, 137 F. (2d) 398 (C. C. A. 2, 1943).*

The Commission's motions to dismiss petitions for review by minority stockholders which were made in the two other cases entitled *Okin* v. *S. E. C.*, decided by the Second Circuit on July 10, 1944, and referred to on page 15 of the petition, were instances where the Commission believed that the petitions for review were predicated upon nothing more than a disagreement over managerial policy, and that the minority stockholder had failed to show any reason why he should be permitted to bring this dispute to the reviewing court. In the first of these cases the

* *Todd* v. *S. E. C.*, 137 F. (2d) 475 (C. C. A. 6, 1943), may be regarded as a borderline case. However, the Commission did not question the minority stockholder's standing in that case to seek review of a dissolution order pursuant to Section 11 (b) (2), not challenged by the company.

Second Circuit, expressly relying on the decision below, recognized the applicability of the derivative suit rule and granted our motion to dismiss. In the other case the motion to dismiss was denied, although the Court intimated that summary affirmance of the Commission's order might have been appropriate if the Commission had filed with the Court the transcript of the record.[10] As we have already indicated, this is a wholly different facet of the problem raised by petitioner and we believe it clear that there is no conflict between the views of the First and Second Circuits with respect to the issues raised by the instant petition.

6. There remains petitioner's contention that it is necessary to give American an independent standing to seek review of the Commission's order because of the possibility that American may be in a position to challenge the order on grounds not open to Florida. This contention rests on the

[10] The filing of a complete transcript would in this, and many other cases, be a burdensome and time-consuming task which should not be deemed a jurisdictional prerequisite to summary disposition of a frivolous petition. The Commission has, therefore, moved the Second Circuit to dismiss or affirm upon the same ground previously urged, but after the filing for purposes of the motion, of an abbreviated transcript (see Rule 75 (j) of the Rules of Civil Procedure). The granting of this new motion would render moot our disagreement with the earlier decision. Denial of the motion might warrant our filing a petition for a writ of certiorari. We will advise the Court promptly of any decision by the Second Circuit on this motion, and of any determination by the Government as to seeking review of the rulings of the Second Circuit. We call attention to

fact that the order complained of affects the earned surplus accounts of Florida, and therefore may affect the future distribution of earnings by Florida to its stockholder, American. By a process of reasoning which combines both reliance upon and disregard for the corporate fiction, petitioner has conjured up an imaginary conflict between the interest of Florida to retain earnings and the interest of its sole stockholder to receive these earnings as dividends. In its brief in the court below petitioner stated (p. 4), "Undoubtedly the Commission will contend that Florida cannot complain that American is being deprived of dividends as a result of the Orders." The Commission disclaimed the intention of making any such argument, stating (p. 4, reply brief):

> The Commission has not contended, and does not contend, that Florida lacks standing to seek judicial review of an order directing the manner in which it shall keep its accounts, and we recognize that among the matters which may properly be considered on such review is the question whether the order improperly interferes with any right of the corporation to pay dividends and of its stockholders to receive them, and with the value of its outstanding securities.

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these circumstances with the thought that the Court may wish to defer action on the present petition until it is in a position to consider the other aspects of the problem which are before the Second Circuit. Whatever the outcome of the other cases, however, we are of the view that the instant petition should be denied.

This position, as indicated in the opinion of the court below, was reaffirmed at the oral argument and we reaffirm it now. Nevertheless, petitioner urges that the point is one which an appellate court might raise on its own motion. These fears are predicated upon a colloquy between counsel for petitioner and one of the members of the Court which occurred in the course of oral argument of *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119. However, we submit that, as the Court ultimately decided, the difficulty with petitioner's position in the *Northwestern Electric Company* case was the weakness on the merits of its contentions irrespective of whether urged in the name of the parent company or its subsidiary.[11]

When the merits of the accounting order involved in the present case come to be considered, it cannot be questioned that Florida, as the company immediately affected, has every right to challenge the order in so far as it may be shown to be arbitrary or unreasonable or in excess of statutory authority. We cannot believe there-

[11] That case involved the validity of a Federal Power Commission order affecting the accounts of an operating company. The operating company and its parent holding company joined in the petition for review of that order which was filed in the Circuit Court of Appeals appropriate for the operating company. No question was raised as to the standing of the parent operating company to join in the petition for review. On the merits of the *Northwestern* case petitioners were unsuccessful in their effort to persuade this Court that the Federal Power Commission in enforcing an accounting system based on cost may not require a subsidiary "public

fore that any different result would be reached upon review depending upon whether it is American or Florida which is the company complaining of the order.[12]

Moreover, even if there were any substance to the fears of American, this difficulty could have been met by American joining with Florida in a petition for review filed in a Circuit Court of Appeals appropriate for Florida. This course was followed by the petitioner in the *Northwestern Electric Company* case, and there may still be open to American intervention in the proceeding in the Fifth Circuit.[13] We regard intervention by American as theoretically inappropriate because unnecessary to protect any substantive rights. However, no inconvenience could result from such interven-

utility" to adjust the carrying value of its assets to an amount not in excess of cost to such public utility, if it appears that a parent holding company has paid for the stock of such public-utility company a sum in excess of underlying book value.

[12] This does not mean, of course, that the reviewing court should assume that any impact of the order on Florida's ability to distribute its earnings in dividends is *pro tanto* equivalent to deprivation of either Florida or its stockholder of the amount so restricted. Corporate management itself may frequently prefer, as in the best interest of its stockholders, the choice of the more conservative of two possible accounting theories notwithstanding the fact that this choice may compel the retention in the business of what might otherwise be recorded as distributable earnings.

[13] It is possible that persons who are parties to the administrative proceeding may be properly permitted to participate in the review of an administrative order although lacking an independent status to challenge such an order. This result

tion and it may be desirable to obviate any ruling as to the substantive consequences of intervention in advance of the ultimate decision on the merits. Accordingly, we will not oppose intervention by American, if sought.

CONCLUSION

The decision below is correct and does not warrant review by this court.

Respectfully submitted,

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has been reached under the somewhat different statutory provisions governing review of orders of the Interstate Commerce Commission. In *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249, it was held that shippers whose competitive advantage was threatened by the Interstate Commerce Commission's order directing the correction of an allegedly discriminatory rate had sufficient interest to participate in an administrative proceeding directed against the carriers, and in an equity suit by the carriers to challenge an order, but not to sue in their own right. The Court said (p. 255):

"Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under § 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order."

APPENDIX

The Public Utility Holding Company Act of 1935, Act of August 26, 1935, c. 687, title I, 49 Stat. 803 (15 U. S. C. 79), provides:

Section 15 (f):

> All accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records kept or required to be kept by persons subject to any provision of this section shall be subject at any time and from time to time to such reasonable periodic, special, and other examinations by the Commission, or any member or representative thereof, as the Commission may prescribe. The Commission, after notice and opportunity for hearing, may prescribe the account or accounts in which particular outlays, receipts, and other transactions shall be entered, charged, or credited and the manner in which such entry, charge, or credit shall be made, and may require an entry to be modified or supplemented so as properly to show the cost of any asset or any other cost.

Section 20 (a):

> The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and

trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the cost of all assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

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